Supreme Court, U.S.
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No. 05-1103

In The

Supreme Court of the United States

GUY C. PATTERSON,

Petitioner,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Congress in the Veterans' Preference Act of 1944 addressed the issue how veterans' preference must be applied to attorney vacancies within the Executive branch?

II. Whether the power to implement the Veterans' Preference Act of 1944 includes the power to exempt occupations from the operation of the statute?

III. Whether the Office of Personnel Management's regulation exempting attorney positions from the requirements of veterans' preference is arbitrary and capricious in light of the reasons relied upon for the change in policy?

PARTIES TO THE PROCEEDING

Petitioner Guy C. Patterson instituted the administrative appeal to the Merit Systems Protection Board (MSPB) in this case. The Department of the Interior (DOI) was the responding agency in that proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Guy C. Patterson respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 424 F.3d 1151. (App. 1a-19a) Both the final opinion of the Merit Systems Protection Board (MSPB) (App. 20a-21a) and the initial decision of the Administrative Judge (AJ) (App. 22a-30a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2005. The court of appeals denied a combined petition for rehearing and for rehearing *en banc* on November 29, 2005. (App. 31a) Jurisdiction in this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Veterans' Preference Act of 1944 is reproduced in the appendix to this petition at App. 32a-42a.

The relevant provision of Title 5 of the Code of Federal Regulations is also set forth at App. 42a-43a.

STATEMENT

This case poses the question how veterans' preference must be applied to attorney vacancies within the Executive branch. Petitioner Guy C. Patterson applied unsuccessfully for a job as a lawyer with the U.S. Department of the Interior in Pittsburgh, Pennsylvania. Notwithstanding Patterson's undisputed status as a preference-eligible veteran, the agency selected a non-veteran for the job.

After exhausting his administrative remedies with the Department of Labor, Patterson appealed to the MSPB under 5 U.S.C. 3330a(d)(1) (Supp. 2005),[1] enacted as part of the Veterans Employment Opportunities Act of 1998 (VEOA), Pub. L. No. 105-339, 112 Stat. 3182. Patterson maintained, *inter alia*, that the agency's selection of a non-veteran without requesting permission to "pass over" a qualified preference-eligible veteran violated his rights under the Veterans' Preference Act of 1944, Pub. L. No. 78-359, 58 Stat. 387 (codified at 5 U.S.C. 2108, 3308-3320). (Pet. App. 66-67) The agency, in turn, relied upon a regulation promulgated by the U.S. Office of Personnel Management (OPM) which permits agencies to apply the "principles" of veterans' preference to attorney positions only insofar as "administratively feasible." 5 C.F.R. 302.101(c)(9). Patterson responded that the regulation was invalid as contrary to the plain language of the statute. Finding that attorney positions are exempt from veterans' preference, the Administrative Judge (AJ) dismissed Patterson's claim for want of jurisdiction. (App. 29a) The full MSPB subsequently issued a *pro forma* decision upholding the AJ's decision. (App. 20a-21a)

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[1] All citations are to the 2000 versions of the United States Code or Code of Federal Regulations unless otherwise specified.

Patterson petitioned the court of appeals for review asserting the invalidity of the regulation. Applying the familiar two-step analysis articulated by this Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and its progeny, the court of appeals held that Congress did not address the question how agencies must apply veterans' preference in filling attorney vacancies; 5 C.F.R. 302.101(c)(9) is a legitimate exercise of OPM's delegated authority to administer the Veterans' Preference Act; and OPM's regulation is reasonable and consistent with the Veterans' Preference Act. (App. 12a-14a) The court of appeals also held, however, that the MSPB possessed jurisdiction to entertain Patterson's VEOA claim. The court of appeals nevertheless affirmed the dismissal of Patterson's VEOA claim, in light of the validity of 5 C.F.R. 302.101(c)(9), for failure to state a claim upon which relief could be granted. (App. 16a)

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

Employing more than 28,000 attorneys, the Executive branch of the Federal government is the nation's largest legal employer. Federal Human Resources Data, http://www.fedscope.opm.gov/employment.asp[2] (last visited February 20, 2006). Between approximately June 2002 and June 2004, the Federal government hired more than 8,000

[2] As of September, 2005, the Federal government employed 28,983 individuals in occupational series 0905, general attorney.

attorneys. (Pet. App. 141)[3] The government does not specify how many preference-eligible veterans applied for each of these more than 8,000 vacancies, but it is noteworthy that three preference-eligible veterans applied for the vacancy here at issue. (Pet. App. 98-100) Furthermore, the Armed Forces of the United States are currently engaged in two conflicts thereby expanding the future pool of potential preference-eligible applicants. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498; 5 U.S.C. 2108. Extrapolating from these figures, it is likely that the court of appeals' decision will affect tens of thousands of veterans over ensuing years.

Secondly, the Federal Circuit's opinion undermines the continued viability of veterans' preference for the bulk of the 1.8 million member Federal civil service. The competitive and excepted services together comprise the bulk of the Federal civil service. 5 U.S.C. 2102-2103. As discussed more fully *infra* at 11, no excepted service vacancies under Title 5 are filled by written examination. Moreover, approximately sixty percent of competitive service vacancies likewise are filled without written examination. Merit Systems Protection Board, *The Role of Delegated Examining Units: Hiring New Employees in a Decentralized Civil Service*, vi, 5 (1999), http://www.mspb.gov/studies/deu.pdf. If, therefore, as the court of appeals concludes, Congress has not addressed how veterans' preference must be applied to any vacancies that

[3] References to "App." refer to the appendix contained in this petition. References to "Pet. App." refer to Petitioner's Appendix in the court of appeals.

are not filled by written examination, then Congress has not addressed how veterans' preference must be applied to most civil service vacancies.

The court of appeals endorses a regulation which the U.S. Court of Appeals for the Seventh Circuit has described as "wholly nondirective." *Pope v. United States D.O.T.*, 421 F.3d 480, 482 (7th Cir. 2005). Thus, the court of appeals' conclusion thwarts Congress' intent to "strengthen and broaden" veterans' preference by giving it a "legislative sanction" with "a permanent standing that cannot be changed except by congressional action." *Hilton v. Sullivan*, 334 U.S. 323, 338 n.11, 14 (1948) (*quoting Hearings before Senate Comm. on Civil Service on S 1762 and HR 4115,* 78th Cong., 2d Sess. 8-9, 41-42 (1944)). Secondly, applying the court of appeals' analysis in conjunction with this Court's decisions in *Chevron* and its progeny, OPM may hereafter apply veterans' preference to most civil service vacancies in whatever manner it sees fit subject only to a deferential standard of reasonableness, a fact that is especially troubling in light of the government's institutional opposition to veterans' preference. David McGlinchey, *Personnel chief says officials avoid veterans hiring rules,* GovExec.com, October 1, 2004, http://www.govexec.com/dailyfed/1004/100104d1.htm. Finally, given that written examinations are currently used to fill primarily entry-level clerical and technical positions as well as positions subject to the *Luevano* consent decree, the court of appeals' decision relegates veterans' preference to the lowest rung of the Federal employment ladder. Merit Systems Protection Board, *The Role of Delegated Examining Units: Hiring New Employees in a Decentralized Civil Service,* 5 (1999); *see also* Tim Kauffman, *Study: Vets are getting lower-level jobs,* Federal Times, January 16, 2006, at 1.

Finally, this Court has not considered the application of veterans' preference to attorney positions for more than a half-century. *Elder v. Brannan,* 341 U.S. 277 (1951). Nevertheless, the Court has long recognized that veterans "have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943). In so doing, veterans subject "themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life." *Johnson v. Robinson*, 415 U.S. 361, 380 (1974). Accordingly, this Court has consistently recognized and approved a policy of compensating veterans by providing them with numerous advantages. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 n.25 (1979). Petitioner finds nothing in this Court's jurisprudence to suggest that this policy applies with any lesser force to veterans called to the bar.

II. BY FAILING TO EMPLOY TRADITIONAL TOOLS OF STATUTORY CONSTRUCTION, THE COURT OF APPEALS MISAPPREHENDED THE INTENT OF CONGRESS AND DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

"If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). As ever, when construing a statute, this Court begins with the text of the statute itself. *Barnhart v.*

Sigmon Coal Co., Inc., 534 U.S. 438, 450 (2002). In this case, the words used by Congress could hardly be more clear.

> The nominating or appointing authority shall select for appointment to each vacancy in the excepted service in the executive branch . . . from the qualified applicants in the same manner and under the same conditions required for the competitive service by sections 3308-3318 of this title. This section does not apply to an appointment required by Congress to be confirmed by, or made with the advice and consent of the Senate.

5 U.S.C. 3320. It is undisputed that attorney vacancies are within the excepted service. With regard to the phrase "each vacancy," it is well-settled that where a statutory term is undefined it is construed according to its ordinary or natural meaning. *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994). "Each" is defined as follows: "*adj.* Being one of two or more considered individually; every." THE AMERICAN HERITAGE DICTIONARY, SECOND COLLEGE ED., 434 (1985). "1 Every (individual of a number) regarded or treated separately." THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY, 823 (Oxford University Press 1971). "*adj.* . . . being one of two or more distinct individuals having a similar relation and often constituting an aggregate. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 713 (2002).

With regard to the phrase "in the same manner and under the same conditions" as required for the competitive service, the court of appeals' predecessor has already construed the phrase in a related statute. In *Bredehorst v.*

United States, 677 F.2d 87 (1982), the U.S. Court of Claims[4] was asked to construe Section 1005(a)(2) of the Postal Service Reform Act, Pub. L. No. 91-375, 84 Stat. 719, 731 (1970) (codified at 39 U.S.C. 1005(a)(2)). Section 1005(a)(2) states that

> [t]he provisions of Title 5 relating to a preference eligible (as that term is defined under section 2108(3) of such title) shall apply to an applicant for appointment and any officer or employee of the Postal Service *in the same manner and under the same conditions* as if the applicant, officer, or employee were subject to the competitive service under such title. The provisions of this paragraph shall not be modified by any program developed under section 1004 of this title or any collective-bargaining agreement entered into under Chapter 12 of this title.

Bredehorst, 677 F.2d 87, 89 (1982) (*quoting* 39 U.S.C. 1005(a)(2) (1976) (emphasis supplied)). Despite an expansive reading of the statute proffered by the plaintiff, the Court of Claims found that section 1005(a)(2) conferred upon preference-eligible postal service employees the same rights granted to preference eligibles in the competitive service by the Veterans' Preference Act. *Id.* Thus, when Congress wished to grant postal service preference-eligibles the same veterans' preference rights enjoyed by their competitive service counterparts, it chose language identical to that in 5 U.S.C. 3320.

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[4] The U.S. Court of Appeals for the Federal Circuit has adopted as precedent the holdings of the U.S. Court of Claims. *South Corp. v. United States*, 690 F.2d 1368, 1369 (Fed. Cir. 1982).

Accordingly, Congress has defined both the scope – "each vacancy in the excepted service" – and the method – "in the same manner and under the same conditions required for the competitive service by sections 3308-3318 of . . . title [5]" – of the statute's operation, excepting only political appointees. Where, as here, Congress has defined the scope of a statute's operation, an agency may not alter that scope by regulation, supplying exemptions which Congress opted to omit. *Chevron* at 843 n.9. In short, Congressional mandates admit no administrative countermands.

Rules of statutory construction are in accord. Where a statute contains an express exception such as the one here for political appointees, that exception comprises the only limitation on the statute's operation and no further exceptions will be implied. *United States v. Johnson*, 529 U.S. 53, 58 (2000); Singer, Norman J., *Sutherland Statutes and Statutory Construction* § 47:11 (6th ed. 2000). Moreover, the statutory command that veterans' preference be applied to excepted service vacancies "in the same manner and under the same conditions required for the competitive service" carries an implied prohibition against applying veterans' preference in any other fashion. *Christensen v. Harris County*, 529 U.S. 576, 583 (2000) (*citing Raleigh & Gaston R. Co. v. Reid*, 13 Wall. 269, 270 (1872)); *Sutherland* at § 47:23.

Where the statutory language is clear on its face, there is little need to resort to legislative history. Nevertheless, the legislative history is in accord. Testifying before the United States Senate Committee on Civil Service, Arthur S. Flemming stated that Section 9 of the Veterans' Preference Act (codified at 5 U.S.C. 3320) "simply applies provisions of this law [the Veterans' Preference

Act] to the unclassified service."[5] *Hearings on S 1762 and HR 4115 Before the Senate Comm. On Civil Service,* 78th Cong., 2d Sess. 27 (1944) (Statement of Arthur S Flemming). At the time of his testimony, Mr. Flemming was the Commissioner, United States Civil Service Commission. *Id.* at 10. Furthermore, a witness testifying on the LaFollette Amendment to the Veterans Preference Act (presently codified at 5 U.S.C. 3313(1)), stated "If they can constrict this thing to the $3,000 dividing line, then of course that is going to take in many legal jobs and junior-attorney jobs and that sort of thing."[6] *Id.* at 38 (Statement of George D. Riley). Given that attorneys are one of the few occupations specifically mentioned in the legislative history of the Veterans Preference Act, it is difficult to conclude that Congress has not addressed the manner in which veterans preference is to be applied to such positions.

The court of appeals, however, gives short shrift to the plain language of 5 U.S.C. 3320, instead turning its attention to 5 U.S.C. 3309. The court of appeals notes that Section 3309 conditions the application of veterans preference upon "receiving a passing grade *in an examination*[7]

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[5] The unclassified service is synonymous with the excepted service. 5 U.S.C. 2103.

[6] In May, 1944, during the hearings on the Veterans Preference Act, attorney positions were within the competitive service by virtue of Section 1 of Executive Order 8743 and, therefore, clearly within the ambit of the Veterans Preference Act.

[7] The Federal Circuit apparently concludes that the applicants for the position here at issue were not subject to an "examination." *But see, Meeker v. Merit Systems Protection Board*, 319 F.3d 1368, 1376-77 (2003) (" . . . unassembled civil service examinations (i.e. examinations based on education, experience, or past achievement, rather than a written test")). *Cf.* Resp. Brief at 6. ("Upon receipt of the application packages, Mr. Babcock [the selecting official] reviewed every application

(Continued on following page)

for entrance into the competitive service." (App. 13a) (emphasis in the original). The court thence reasons that Congress has not spoken to the issue of how veterans preference is to be applied "to a preference eligible in the competitive service who is not required to pass an examination." (App. 13a) Accordingly, by operation of 5 U.S.C. 3320, the court of appeals concludes that "Congress has not spoken on the issue of how to apply the principles of veterans preference to positions within the excepted service that are not subject to examination." (App. 13a).

The flaw in the court of appeals' reasoning is plain: ***all*** excepted service positions, by definition, are "excepted" from the competitive examination requirement of 5 U.S.C. 3304(a). (App. 13a); 5 U.S.C. 3302(2); 5 C.F.R. 6.1(a) ("OPM may except positions from the competitive service when it determines that appointments thereto through competitive examination are not practicable."). *See, also, U.S. Dept. of Health & Human Services v. F.L.R.A.*, 858 F.2d 1278, 1279 n.2 (7th Cir. 1988) ("Excepted service employees typically involve positions for which it is not practicable to hold a competitive examination."); *Bosco v. United States*, 931 F.2d 879, 882 n.2 (Fed. Cir. 1991) ("The term 'competitive service' refers to federal employees who have been hired after taking a Civil Service examination, while the term 'excepted service' refers to employees hired without the requirement of such an examination."); 3 Op. O.L.C. 140, 142 (1979) ("[T]he essential distinction between the competitive and excepted service is that

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and assessed each candidate in terms of, among other qualities, areas of relevant legal and non-legal experience, breadth of legal and relevant non-legal experience, employment history, academic achievement, and veterans' preference.").

positions in the former are filled on the basis of competitive examinations while those in the latter are not."). If passing a written test is, as the court of appeals suggests, the *sine qua non* for the application of veterans' preference, then Congress has not spoken on how veterans' preference is to be applied to ***any*** position in the excepted service, a conclusion flatly at odds with the plain language of the statute. Thus, the court of appeals reads section 3320 out of the statute and thereby violates the "cardinal principle of statutory construction" that a statute ought to be construed so that no clause, sentence, or word is superfluous. *Alaska Dept. of Env. Cons. v. E.P.A.*, 540 U.S. 461, 489 n.13 (2004).

III. IN FAILING TO CONSIDER THE SCOPE OF OPM'S DELEGATED AUTHORITY UNDER THE VETERANS' PREFERENCE ACT, THE COURT OF APPEALS DECIDES AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

The legislative power of the United States is vested in Congress. U.S. CONST., art. I, § 1. Accordingly, the exercise of quasi-legislative authority by Executive agencies is derived from and limited by Congressional grants of authority to the agency. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). Thus, an agency's interpretation of a statute is not entitled to deference where it exceeds the meaning that the statute can bear. *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994). In this instance, Congress has authorized OPM to prescribe regulations that "implement" the Veterans' Preference Act in the excepted service. 5 U.S.C. 1302(c). It is doubtful that the power to implement a statute includes, as its necessary incident, the power to exempt persons or

things from the statute's operation. The common meanings of the words employed augur against it. *Cf.* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 795, 1134 (2002) ("exempt" means "to release or deliver from some liability or requirement to which others are subject: except or excuse from operation of a law or obligation.") ("implement" means "to carry out: . . . ***esp***: to give practical effect to and ensure of actual fulfillment by concrete measures."). Indeed, if the power to "implement" necessarily includes to power to "exempt", then "the Secretary of the Treasury would effectively be empowered to repeal taxes that the Congress enacts." *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring in the judgment).

Furthermore, in authorizing the creation of an excepted service, Congress specifically authorized the President to make exceptions from certain enumerated provisions of Title 5. 5 U.S.C. 3302(2). Absent from this list are any provisions relating to veterans preference. The canon "*expressio unius est exclusio alterius*" suggests that such omissions should be understood as exclusions. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 154 (2003); Singer, Norman J., *Sutherland Statutes and Statutory Construction* § 47:23 (6th ed. 2000).

IV. IN FAILING TO CONSIDER THE REASONS UNDERLYING OPM'S CHANGE IN POLICY, THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

In failing to consider the reasons for OPM's policy change, the court of appeals contravenes controlling precedent of this Court. *Motor Vehicle Mfrs. Assn. v. State*

Farm Mut., 463 U.S. 29 (1983). If Congress has explicitly left a gap for an agency to fill, then an agency regulation filling that gap is binding in the courts "unless procedurally defective, arbitrary and capricious in substance, or manifestly contrary to the statute." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). Although the scope of review under the arbitrary and capricious standard is narrow, nevertheless, an agency "must examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Assn. v. State Farm Mut.*, 463 U.S. 29, 43 (1983). Furthermore, "an agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Id.* at 42. In considering an agency's proffered explanation, a reviewing court must "consider whether the decision was based upon the relevant factors and whether there has been a clear error of judgment." *Id.* at 43. Finally, an agency rule normally "would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

The court of appeals while noting that OPM has found the application of veterans' preference to attorney positions unworkable omits any discussion of how OPM arrived at its conclusion. (App. 14a) The record reflects that OPM formerly considered the "positive factor" method insufficient to satisfy the requirements of the Veterans Preference Act. 2 Op. O.L.C. 179, 183 (1978). Indeed, OPM formerly considered numerical rating and ranking to be

required "in order to fully comply with the requirements of [the Veterans Preference Act]." 2 Op. O.L.C. 179 (1978). It is undisputed that "OPM amended [5 C.F.R.] section 302.101(c) to include attorney positions within the exemption . . . , in 1979, in light of the issuance of an Attorney General opinion on that issue." (Resp. Brief at 30) (*citing* 44 Fed. Reg. 666573 (November 20, 1979)); 3 Op. O.L.C. 140 (1979); 2 Op. O.L.C. 179 (1978).[8] DOJ, in turn, offers four justifications why veterans preference cannot be applied to attorney positions. For the reasons which follow, these justifications are without merit.

To begin, DOJ posits that Section 2 of the Veterans Preference Act rather than Section 9 governs the application of veterans preference to attorney positions. 3 Op. O.L.C. 140, 141 (1979). This theory had been considered and rejected by this Court twenty-eight years earlier. *Elder v. Brannan*, 341 U.S. 277 (1951).

In *Elder*, this Court held that Section 2 confers no specific preference rights at all but only contains a listing of preferred groups. *Id.* at 286; *See, also*, H.R. Rep. 1289, 78th Cong., 2d Sess. (1944). This Court further held that details for applying veterans preference are spelled out in subsequent sections of the Act. *Elder v. Brannan*, 341 U.S. 277, 286 (1951). Where this Court has already construed Section 2 of the Veterans Preference Act, that construction is binding upon the agency under principles of *stare decisis*. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-537 (1992). Therefore, DOJ's first justification necessarily fails.

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[8] In discussing DOJ's "ruling", it is clear that the two opinions issued in 1978 and 1979 are of a piece and Petitioner discusses both in his analysis.

Secondly, DOJ maintains that, because attorney positions are not filled pursuant to a written test, there is no examination score to which points may be added and, thus, it is impossible to comply with the statute. 3 Op. O.L.C. 140, 142 (1979); 2 Op. O.L.C. 179, 180 (1978). Once again, however, no excepted service positions under Title 5 are filled using written tests. (App. 13a); 5 U.S.C. 3302(2); 5 C.F.R. 6.1. Thus, DOJ like the court of appeals, would simply read section 3320 out of the statute. Furthermore, OPM has promulgated regulations for applying veterans preference to excepted service positions where numerical scores are not used. 5 C.F.R. 302.201(b). Therefore, DOJ's assertion that it is "impossible" to apply veterans' preference absent a numerical test score is simply baseless.

Thirdly, DOJ claims the "positive factor" test is consistent with the manner in which veterans' preference was applied to attorney positions by the now defunct Board of Legal Examiners. 3 Op. O.L.C. 140, 144, 147; 2 Op. O.L.C. 179, 183-184 (1979). Established by Executive Order 8743, the Board of Legal Examiners did not numerically rank attorney applicants but merely "appropriately designated" preference eligible veterans. 6 Fed. Reg. 2117, 2118, § 3(f) (April 25, 1941). Executive Order 8743, however, was superseded by the Veterans Preference Act.

Section 18 of the Veterans Preference Act provides in pertinent part:

> All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith. . . .

58 Stat. 387, 391 (1944). This provision encompasses Executive Orders as demonstrated by the following colloquy:

> Senator Langer: I cannot see any objection to putting whatever the Executive Orders are right into the law.
>
> Senator Byrd: I think if we had time to go into it fully, but you would have to determine whether or not the committee would approve of the different Executive orders and it would take some time to do it.
>
> Mr. Rice: I think it would slow it up and I do not see any good purpose served. Those Executive orders, I understand, that are inconsistent with this bill would automatically be canceled anyway.

Hearings on S 1762 and HR 4115 Before the Senate Comm. On Civil Service, 78th Cong., 2d Sess. 57 (1944) (Statement of Kenneth C. Vipond).

Secondly, DOJ's argument here is a *non sequitur*. DOJ claims the "positive factor" test is consistent with the manner in which veterans' preference was applied to attorney positions by the Board of Legal Examiners. 3 Op. O.L.C. 140, 144, 147; 2 Op. O.L.C. 179, 183-184 (1979). Yet DOJ concedes that Congress effectively abolished the Board of Legal Examiners. 3 Op. O.L.C. 140, 144-146 (1979); 2 Op. O.L.C. 179, 180-181 (1978). Consequently, in preference to the plain language of the statute, DOJ elects to apply veterans' preference in a manner consistent with its application by a body Congress saw fit to abolish. DOJ offers no persuasive explanation for such a counterintuitive result.

Finally, DOJ asserts that an appropriations restriction bars OPM from imposing a rating or other examination system on the hiring of attorneys. 3 Op. O.L.C. 140, 145-146 (1979); 2 Op. O.L.C. 179, 180-181 (1978). In the

first instance, DOJ overlooks the fact that Congress and not OPM imposed the requirement here at issue. 5 U.S.C. 3320.

Secondly, the appropriations restriction does not speak to the issue of veterans preference at all but merely states:

> Provided further, That no part of any appropriation in this Act shall be available for the salaries and expenses of the Board of Legal Examiners created in the Civil Service Commission by Executive Order 8743 of April 23, 1941.

Independent Offices Appropriation Act, 1944, Pub. L. No. 78-90, 57 Stat. 169, 173 (1943). As evidence that Congress intended this restriction to bar the application of veterans' preference to attorney positions, DOJ cites the statements of the sponsor of the restriction and one other Senator made during the floor debate on the legislation. 3 Op. O.L.C. 140, 145-146 (1979); 2 Op. O.L.C. 179, 181-182 n.3 & n.4 (1978). *See also,* 90 Cong. Rec. 2659-2662 (1944). The difficulty with DOJ's argument is timing. The floor debate referenced by DOJ took place on March 16, 1944, fully three months prior to enactment of the Veterans' Preference Act. DOJ simply offers no explanation why, if Congress intended to bar the application of veterans' preference to attorneys in March, Congress created no exemption for attorneys in the Veterans' Preference Act passed in June.

Thirdly, DOJ's argument rests upon the dubious premise that application of veterans' preference constitutes an "examination" because it "would purport to objectively measure the abilities of attorneys and seek to gauge the 'relative qualifications' of attorneys." 2 Op.

O.L.C. 179, 181 (1978). According to the statutory language, however, veterans' preference is triggered only after the "examination" process is concluded. 5 U.S.C. 3309 ("A preference eligible who receives a passing grade in an examination. . . . "); 5 U.S.C. 3320 (Veterans' preference is applied only to "qualified applicants."); *See also, Meeker v. Merit Systems Protection Board*, 319 F.3d 1368, 1372 (Fed. Cir. 2003) ("The scoring of the examination and the award of veteran preference points are therefore separate steps in the process of calculating the final scores on which eligibility will be determined.").

CONCLUSION

The writ of *certiorari* should be granted.

Respectfully submitted,

GUY C. PATTERSON
Petitioner, Pro Se

United States Court of Appeals
for the Federal Circuit

05-3047

GUY C. PATTERSON

Petitioner,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Guy C. Patterson, pro se petitioner.

Cristina C. Ashworth, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for respondent. With him on the brief were Peter D. Keisler, Assistant Attorney General, David M. Cohen, Director and Robert E. Kirschman, Jr., Assistant Director. Of counsel on the brief were Steven E. Abow and Risa B. Cherry, Attorneys, Office of Personnel Management, of Washington, DC.

Appealed from: United States Merit Systems Protection Board

DECIDED: September 19, 2005

Before SCHALL, Circuit Judge, ARCHER, Senior Circuit Judge, and BRYSON, Circuit Judge.

SCHALL, Circuit Judge.

Guy C. Patterson applied for the position of Attorney-Advisor, GS-0905-11/13, with the Department of the

Interior ("agency") in Pittsburgh, Pennsylvania. After the agency did not select him for the position, Mr. Patterson appealed to the Merit Systems Protection Board ("Board"), asserting claims under the Veterans Employment Opportunities Act of 1998 ("VEOA"), Pub. L. No. 105-339, 112 Stat. 3182 (codified at 5 U.S.C. § 3330a *et seq.*), and the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), Pub. L. No. 103-353, 108 Stat. 3149 (codified at 38 U.S.C. § 4311 *et seq.*).[1] After the Board dismissed his appeal for lack of jurisdiction, *Patterson v. Dep't of the Interior,* PH-3443-03-0078-I-1 (M.S.P.B. Sept. 22, 2004) ("*Final Decision*"); *Patterson v. Dep't of the Interior,* PH-3443-03-0078-I-1 (M.S.P.B. Mar. 11, 2003) ("*Initial Decision*"), Mr. Patterson petitioned us for review. For the reasons set forth below, we see no error in the Board's dismissal of Mr. Patterson's VEOA claim. However, we conclude that the Board did err in dismissing his USERRA claim. Accordingly, the Board's decision is affirmed-in-part and reversed-in-part, and the case is remanded to the Board for adjudication of the merits of Mr. Patterson's USERRA claim.

BACKGROUND

I.

On July 16, 2002, the agency opened Vacancy Announcement No. 02-13-SOL-PITTSBURGH, soliciting applications for the position of Attorney-Advisor (General) GS-0905-11/13 in its Office of the Solicitor in Pittsburgh, Pennsylvania. The announcement stated that the position

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[1] Unless otherwise indicated, statutory references are to the 2000 version of the United States Code.

was "in the Excepted Service" and, among other things, requested that applicants submit information pertinent to whether they qualified for a "veterans' preference." Mr. Patterson submitted an application on July 21, 2002. His application stated that he had served on active duty with the U.S. Navy from May 1989 through July 1992.

On August 22, 2002, Mr. Patterson sent a letter to the agency inquiring as to the rating assigned to his application. The agency responded by informing Mr. Patterson that although it had not yet completed the preliminary review of the applications, "no numerical score will be assigned," as "[i]t is not the practice of this office to assign numerical scores to attorney applications." After about one month, Mr. Patterson sent a second letter to the agency, inquiring as to the status of his application. The agency subsequently informed Mr. Patterson that it had filled the position.

On October 30, 2002, Mr. Patterson wrote the agency, requesting that it "furnish [him] with the reason or reasons for [his] non-selection . . . pursuant to 5 C.F.R. § 302.101(c)."[2] In addition, Mr. Patterson filed a complaint with the U.S. Department of Labor ("DOL"), alleging that the agency's decision not to select him for the position resulted in a violation of his veterans' preference rights and amounted to discrimination on the basis of his prior military service, in violation of USERRA. On November 13, 2002, the agency provided Mr. Patterson with the following explanation for his non-selection:

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[2] Section 302.101(c) requires that an agency provide a "qualified and available" preference eligible with a statement of the reasons for his or her non-selection for an attorney position. *See* 5 C.F.R. § 302.101(c)(9).

> While your academic record appeared good, your resume did not indicate any experience specifically relevant to the work of this office. Your veteran's preference was given consideration as a *positive factor* in the evaluation process, but as you are aware, selecting a person for an attorney position is a process that requires a careful weighing of a large number of variables. In significant part, I did not feel the preference overcame the lack of relevant experience and/or background.

(Emphasis added). About a week later, DOL notified Mr. Patterson that it had decided to close the investigation into his discrimination complaint based upon its determination that his claims lacked merit.

II.

On November 27, 2002, Mr. Patterson filed an appeal with the Board, asserting that his non-selection by the agency violated his veterans' preference rights under the VEOA and that, by not selecting him, the agency had discriminated against him on the basis of his prior military service, in violation of USERRA. On December 20, 2002, the administrative judge ("AJ") assigned to the case issued a jurisdictional show cause order, requiring Mr. Patterson to come forward with non-frivolous allegations to support his claims. *Patterson v. Dep't of Interior*, PH-3443-03-0078-I-1 (M.S.P.B. Dec. 20, 2002). Mr. Patterson and the agency both filed responses to the show cause order.

With respect to his VEOA claim, Mr. Patterson alleged that the agency violated his veterans' preference rights by, *inter alia*, not adding "additional points above his earned

rating," as required by 5 U.S.C. § 3309. For its part, the agency argued that attorney positions are excepted from the rating and ranking procedures applicable to veterans' preferences, and that therefore it was not required to follow the scoring procedures set forth at 5 U.S.C. § 3309. The AJ agreed with the agency, reasoning that attorney positions are specifically excepted from the competitive service, and that the agency was therefore not required to "rate and rank" the applicants for the attorney-advisor position. The AJ held that Mr. Patterson "failed to support his VEOA . . . claim with any factual assertions which show that the agency violated any statute or regulation relating to veterans' preference." *Initial Decision,* slip op. at 7. Accordingly, the AJ dismissed Mr. Patterson's VEOA claim for lack of jurisdiction. *Id.*

As far as his USERRA claim was concerned, Mr. Patterson alleged that the agency's reason for not selecting him was a pretext, and that, in actuality, the agency decided not to select him because of his prior military service. In support of his claim, Mr. Patterson argued that, while the agency's purported reason for not selecting him was that it received applications from more qualified individuals, the person actually selected for the attorney-advisor position did not have any notable academic distinction or particularly relevant work experience. The AJ rejected this argument, stating that Mr. Patterson "did not set forth any specific facts which show that the agency treated him more harshly or disparately in non [sic] selecting him for a position when compared to a similar situated individual who did not have prior military service." *Id.* slip op. at 5. Rather, the AJ concluded, Mr. Patterson's contention that he was more qualified than the person who received the position merely amounted to

"vague and generalized statements" and was not sufficient to make out a non-frivolous claim of discrimination based on prior military service. *Id.* Consequently, the AJ also dismissed Mr. Patterson's USERRA claim for lack of jurisdiction. *Id.*

The Board denied Mr. Patterson's petition for review of the AJ's initial decision, *Final Decision,* and Mr. Patterson subsequently appealed to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9).

ANALYSIS

The scope of our review in this case is limited by statute to whether the Board's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law, rule, or regulation having been followed; or unsupported by substantial evidence. 5 U.S.C. § 7703(c); *Carley v. Dep't of the Army,* 413 F.3d 1354, 1356 (Fed. Cir. 2005). The issue of whether the Board has jurisdiction over an appeal is a question of law, which we review *de novo. Hayes v. United States Postal Serv.,* 390 F.3d 1373, 1376 (Fed. Cir. 2004).

On appeal, Mr. Patterson contends the Board erred in concluding that it lacked jurisdiction over his VEOA and USERRA claims. He contends that the Board had jurisdiction over his VEOA claim because he established that the agency's non-selection violated his veterans' preference rights. He contends that the Board had jurisdiction over his USERRA claim because he asserted a non-frivolous allegation of discrimination on the basis of his prior military service. We address each of Mr. Patterson's contentions in turn, starting with his VEOA claim.

I.

A.

The VEOA provides redress for a preference eligible veteran "who alleges that an agency has violated . . . [his or her] rights under any statute or regulation relating to veterans' preference." 5 U.S.C. § 3330a(a)(1)(A) (Supp. 2005).[3] Veterans' preference rights are defined by the Veterans' Preference Act of 1944 ("VPA"), Pub. L. No. 78-359, 58 Stat. 387 (codified at 5 U.S.C. §§ 2108, 3309-3320), and its attendant regulations, *see* 5 C.F.R. §§ 302.101-302.403 (2005). The VPA generally gives a qualifying veteran, known as a "preference eligible," various preferences in applying for civil service positions within the competitive and excepted services.[4]

For example, and of relevance to this appeal, section 3309 of title 5 provides preference eligibles with additional

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[3] The VEOA directs preference eligibles to file a complaint regarding veterans' preference with the Secretary of DOL. If the matter is not resolved by the Secretary, an appeal may be taken to the Board. 5 U.S.C. § 3330a(a)(1)(A), (d)(1) (Supp.2005).

[4] Civil service positions within the federal government are divided into the "competitive service" and the "excepted service." 5 U.S.C. §§ 2102-2103. Competitive service positions include "civilian positions in the executive branch . . . unless specifically excepted therefrom" and "all positions in the legislative and judicial branches of the Federal Government and in the Government of the District of Columbia which are specifically made subject to the civil service laws by statute." 5 C.F.R. § 1.2 (2005). The excepted service "consists of those civil service positions which are not in the competitive service or the Senior Executive Service." 5 U.S.C. § 2103. Congress has delegated to the President authority to designate civil service positions that are in the excepted service, *see id.* § 3302(1) (2000) ("The President may prescribe rules . . . for . . . necessary exceptions of positions from the competitive service. . . ."), and the President has, in turn, delegated this authority to OPM, *see* 5 C.F.R. § 5.1 (2005).

rating points in applying for positions in the competitive service. It reads:

> A preference eligible who receives a passing grade in an examination for entrance into the competitive service is entitled to additional points above his earned rating, as follows –
>
> **(1)** a preference eligible under section 2108(3)(C)-(G) of this title – 10 points; and
>
> **(2)** a preference eligible under section 2108(3)(A) of this title – 5 points.

In addition, although on its face section 3309 appears to apply only to positions within the competitive service, Congress, through 5 U.S.C. § 3320, has extended veterans' preference rights to the excepted service as well:

> The nominating or appointing authority shall select for appointment to each vacancy in the excepted service . . . from the qualified applicants *in the same manner and under the same conditions required for the competitive service by sections 3308-3318 of this title [5].* This section does not apply to an appointment required by Congress to be confirmed by, or made with the advice and consent of, the Senate.

5 U.S.C. § 3320 (emphasis added).

Congress delegated the responsibility for implementing section 3320 to the Office of Personnel Management ("OPM"). *See* 5 U.S.C. § 1302(c). Accordingly, OPM has issued regulations setting forth procedures for applying veterans' preference rights to the excepted service. *See* 5 C.F.R. pt. 302. OPM's regulations state that the general rating and ranking procedures of 5 U.S.C. § 3309 apply to nominations and appointments in the excepted service

when an agency uses numerical scoring in evaluating applicants.

> When numerical scores are used in the evaluation and referral, the agency shall grant 5 additional points to preference eligibles under section 2108(3)(A) and (B) of title 5 . . . and 10 additional points to preference eligibles under section 2108(3)(C) through (G) of that title.

5 C.F.R. § 302.201(a) (2005). However, not all appointments within the excepted service are made using numerical rate and ranking procedures. For these positions, OPM's regulations provide for a more qualitative accounting of veterans' preference rights. *See id.* § 302.201(b) ("When eligible candidates are referred without ranking, the agency shall note preference as 'CP' for preference eligibles under 5 U.S.C. § 2108(3)(c), as 'XP' for preference eligibles under 5 U.S.C. § 2108(3)(D) through (G), and as 'TP' for all other preference eligibles under that title.").

In addition, OPM has wholly exempted some positions within the excepted service from the appointment procedures of 5 C.F.R. Part 302. *See id.* § 302.101(c). For these exempted positions, OPM simply directs agencies to "follow the principle of veteran preference as far as administratively feasible." *Id.* As already seen, in this case the agency treated Mr. Patterson's status as a veteran as a "positive factor." OPM views the positive factor test as consistent with the requirement of section 302.101(c) that, in hiring for certain positions in the excepted service, agencies "follow the principle of veteran preference as far as administratively feasible." (Br. of Appellee at 27-28 & 28 n.7.) OPM includes attorney positions within this exemption. *Id.* § 302.101(c)(9).

B.

Mr. Patterson's VEOA claim appears to be that the agency violated his veterans' preference rights by failing to rate and rank his application and by failing to accord him 5 additional rating points under 5 U.S.C. § 3309 as a preference eligible. The government's response is that the agency properly accounted for Mr. Patterson's status as a preference eligible by counting it as a positive factor under 5 C.F.R. § 302.101(c) in its review of his application. Mr. Patterson rejoins that the agency still violated his veterans' preference rights in applying the positive factor test because OPM's regulation at 5 C.F.R § 302.101(c), from which the positive factor test flows, is invalid as contrary to the plain language of 5 U.S.C. § 3320.

Mr. Patterson emphasizes that the plain language of 5 U.S.C. § 3320 states that "[t]he nominating or appointing authority shall select for appointment to each vacancy in the excepted service . . . from the qualified applicants *in the same manner and under the same conditions required for the competitive service by sections 3308-3318 of . . . title [5].*" Moreover, Mr. Patterson continues, section 3309 expressly entitles a preference eligible to an additional 5 or 10 points in his or her qualifying rating and ranking. Accordingly, Mr. Patterson asserts that 5 C.F.R. § 302.101(c), which merely requires an agency to "follow the principle of veteran preference as far as administratively feasible," is invalid as contrary to 5 U.S.C. §§ 3309 and 3320. Mr. Patterson further asserts that the positive factor test, which is OPM's test for implementing 5 C.F.R. § 302.101(c), is similarly invalid. Mr. Patterson contends therefore that the agency violated his veterans' preference rights by following the "administratively feasible" and "positive factor" tests and thereby failing to properly

account for the 5 additional points to which he was entitled under 5 U.S.C. § 3309 as a preference eligible.

The government, on the other hand, contends that 5 C.F.R. § 302.101(c) was promulgated pursuant to OPM's delegated authority to administer the VPA and is thus entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The government further contends that, in promulgating 5 C.F.R. § 302.101(c), OPM struck a reasonable balance between the VPA's goal of affording veterans hiring preferences in the excepted service and the excepted service's goal of providing agencies with flexibility in hiring for certain specified positions. In fact, the government asserts, accepting Mr. Patterson's interpretation of the VPA and, specifically, 5 U.S.C. §§ 3309 and 3320, would effectively eliminate the purpose of the excepted service, by requiring agencies to follow formal examination, rating, and ranking procedures before filling any vacancies in that service. The government similarly contends that the positive factor test, embodying OPM's interpretation of how to implement 5 C.F.R. § 303.101(c), is also valid.

C.

As reflected by the arguments of the parties, Mr. Patterson's VEOA claim concerns the procedures used by the agency in filling attorney vacancies. It is undisputed that attorney positions are within the excepted service and that, in making appointments to attorney positions, the agency does not examine and numerically rank applicants.[5]

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[5] Pursuant to its delegated authority, OPM has created three schedules of excepted service positions: Schedule A, Schedule B, and

(Continued on following page)

It also is undisputed that, through 5 C.F.R. § 302.101(c)(9), attorneys fall within OPM's exemption, which merely requires application of veterans' preference rights "as far as administratively feasible." Therefore, the specific issue before us is whether OPM acted within its delegated authority in promulgating 5 C.F.R. § 302.101(c)(9).

When we review the validity of an agency's interpretation of a statute, our first task is to determine "whether Congress has directly spoken to the precise question at issue." *Chevron,* 467 U.S. at 842. That is because, "[i]f the intent of Congress is clear, that is the end of the matter," because we "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.; see also Doe v. United States,* 372 F.3d 1347, 1358 (Fed. Cir. 2004).

The "precise question" addressed by 5 C.F.R. § 302.101(c)(9) is how an agency should apply veterans' preference principles in making hiring decisions for filling attorney vacancies. We do not think Congress has addressed this question. It is true that 5 U.S.C. § 3320 states that nominations and appointments to the excepted

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Schedule C. 5 C.F.R. pt. 213 (2005). Schedule A is of relevance to this case, and is titled, "Positions other than those of a confidential or policy-determining character for which it is impracticable to examine." *Id.* § 213.3101. "Examining," for purposes of Schedule A, means "application of the qualification standards and requirements established for the competitive service." *Id.* "Attorneys" are specifically listed in Schedule A. *Id.* § 213.3102(d). Attorney positions are therefore within the excepted service. As a result, applicants for them are not subject to examination.

service are to be made "in the same manner and under the same conditions required for the competitive service by sections 3308-3318 of . . . title [5]." It also is true that 5 U.S.C. § 3309, relating to the examination of preference eligibles for positions in the competitive service, states that a qualifying preference eligible is entitled to an increase of 5 points in his or her rating score (10 points if the preference eligible is disabled). However, section 3309 also provides that the increased rating is conditioned on the preference eligible "receiv[ing] a passing grade *in an examination* for entrance into the competitive service." 5 U.S.C. § 3309 (emphasis added); *see also Meeker v. Merit Sys. Prot. Bd.*, 319 F.3d 1368, 1372 (Fed. Cir. 2003) ("The Veterans' Preference Act makes clear that veteran preference points, as applicable, are added to the score of a candidate who 'receives a passing grade in an examination for entrance into the competitive service.'"). In addition, while examinations are commonly required for appointments in the competitive service, *see* 5 U.S.C. § 3304, the President is specifically authorized to make exceptions to the examination requirement, *see id.* § 3302(2); *id.* § 3304(b). Therefore, 5 U.S.C. § 3309 is silent on the issue of how agencies should apply veterans' preference rights to a preference eligible in the competitive service who is not required to pass an examination. As seen, section 3320 of title 5 refers to examinations and appointments to the excepted service being made "in the same manner and under the same conditions required for the competitive service by sections 3308-3318 of . . . title [5]." It therefore necessarily follows that Congress has not spoken on the issue of how to apply the principles of veterans' preference to positions within the excepted service that are not subject to examination. In other words, Congress left a "gap" in the VPA on this issue, and the regulations issued

by OPM to fill this gap are therefore entitled to deference under *Chevron*. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2700 (2005) ("*Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps."); *see also Chevron*, 467 U.S. at 843-44. OPM's regulation at 5 C.F.R. § 302.101(c)(9) fills this gap, since applicants for attorney vacancies in the excepted service are not subject to examination.

We next must determine whether OPM's gap-filling regulation at 5 C.F.R. § 302.101(c)(9) is reasonable and consistent with the VPA. We conclude that it is. The purpose of the VPA is to provide preference eligible veterans with additional benefits in seeking employment within the civil service system. Section 3309 of title 5 does this by providing for set increases in the rating of preference eligibles who receive a passing score on an agency's examination. In the excepted service, OPM still requires agencies to follow this scheme "[w]hen numerical scores are used in the evaluation and referral" of the applicants. 5 C.F.R. § 302.201; *see also id.* § 302.302(b). However, for attorney positions, OPM has recognized that this scheme is not workable because agencies do not use numerical scores in assessing applicants for such positions. OPM has consequently directed agencies to "follow the principle of veteran preference as far as administratively feasible." *Id.* § 302.101(c). The agency has interpreted, and OPM has agreed, that this means an agency must consider veteran status as a "positive factor" in reviewing applications. We think this approach represents a reasonable balance between the goals of the VPA and the flexible hiring standards employed by the excepted service for filling attorney vacancies.

Mr. Patterson essentially seeks an interpretation of 5 U.S.C. §§ 3309 and 3320 that would require numerical scoring and ranking in evaluating applicants for all positions within the excepted service. Mr. Patterson argues that such a requirement would not require formal "examination" of the applicants, just numerical ranking based on a comparison of the applicants' qualifications to the agency's description of the position's requirements. We do not find this argument persuasive. For one thing, as a practical matter, we do not see how Mr. Patterson's interpretation would not require agency examinations. His interpretation therefore ignores 5 U.S.C. § 3302, which allows the President (and, thus, OPM) to except designated positions in the excepted service from the procedures utilized in the competitive service.

In addition, Mr. Patterson's proposed interpretation – that is, his contention that agencies could numerically rate and rank attorney applicants without subjecting them to an "examination" – is, at best, simply another possible interpretation of 5 U.S.C. §§ 3309 and 3320. It is well settled law, however, that where *Chevron* deference is due, our role is not to substitute the agency's interpretation with what we think might be a better interpretation. Rather, our role is limited to assessing whether the agency's interpretation is reasonable. *Chevron,* 467 U.S. at 843 n.11 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."). In this case, we hold that 5 C.F.R. § 302.101(c)(9) represents a reasonable interpretation of how 5 U.S.C. §§ 3309 and 3320 apply to attorney positions within the excepted service. The positive factor test, in turn, strikes us as a reasonable way of "follow[ing] the principle of veteran

preference as far as administratively feasible," 5 C.F.R. § 302.101(c), in the case of a preference eligible applying for an excepted service attorney position.

In sum, because the agency considered Mr. Patterson's status as a preference eligible a positive factor in evaluating his application, we agree with the Board that Mr. Patterson failed to assert a violation of his veterans' preference rights. We thus see no error in the Board's dismissal of his VEOA claim. We do think, though, that the dismissal should have been for failure to state a claim upon which relief could be granted, rather than for lack of jurisdiction. The Board had jurisdiction to consider Mr. Patterson's claim, which was brought under the VEOA. However, the claim failed on the merits. *See Do-Well Machine Shop, Inc. v. United States,* 870 F.2d 637, 639 (Fed. Cir. 1989) ("'[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.'") (quoting *Bell v. Hood,* 327 U.S. 678, 682 (1946)).

II.

Mr. Patterson also challenges the Board's dismissal of his USERRA claim. He contends that he asserted a non-frivolous USERRA claim based on his allegation that the agency discriminated against him on the basis of his prior military service. USERRA states, in relevant part, that "[a] person who . . . has performed in a uniformed service shall not be denied initial employment . . . by an employer on the basis of that . . . performance of service." 38 U.S.C. § 4311(a). It is undisputed that Mr. Patterson served in the U.S. military and that he was not selected by the agency for the attorney-advisor position. Therefore, the only issue

before us is whether Mr. Patterson also made a non-frivolous allegation that the agency's decision not to select him was made on the basis of his prior military service.

We have previously recognized and endorsed the Board's "liberal approach in determining whether jurisdiction exists under USERRA." *Yates v. Merit Sys. Prot. Bd.*, 145 F.3d 1480, 1484 (Fed. Cir. 1998). Under that approach, the "relative weakness of the specific factual allegations initially made by an appellant in his USERRA claim . . . should not serve as the basis for dismissing [his appeal] for lack of jurisdiction," but "if he fails to develop those allegations, his USERRA claim[] should simply be denied on the merits." *Duncan v. United States Postal Serv.*, 73 M.S.P.R. 86, 92 (1997), *cited in Yates*, 145 F.3d at 1484. Thus, the Board has held that it has jurisdiction over a USERRA claim where the appellant alleges that (1) he or she served or serves in the military, (2) suffered a loss of a benefit of employment, and (3) the loss of the benefit was due to his or her service in the military. *See Yates*, 145 F.3d at 1484-85; *see also Perkins v. United States Postal Serv.*, 85 M.S.P.R. 545, 547 (2000) (finding Board jurisdiction where the appellant alleged "that, while he performed well during his first casual appointment, he was not reinstated for a second appointment, although three others who were not veterans were reinstated"); *Jasper v. United States Postal Serv.*, 73 M.S.P.R. 367, 368-71 (1997) (finding that appellant had a right to a hearing on the merits where he alleged that "the agency's action was discriminatory on the basis of his 'being retired military with some disability'"); *Duncan*, 73 M.S.P.R. at 92 ("An allegation that an appellant's employer took or failed to take various actions based on his status as a veteran, in violation of the protections guaranteed under USERRA, thus would constitute a

nonfrivolous allegation entitling him to Board consideration of his USERRA claim. The relative weakness of the specific factual allegations initially made by an appellant in his USERRA claim thus should not serve as a basis for dismissing them for lack of jurisdiction.").

In this case, Mr. Patterson alleged that the agency did not select him on the basis of his prior military service. He further alleged that the agency's reason for not selecting him – i.e., that he was not as qualified as the selected individual – was a pretext, as evident from a comparison of his qualifications to those of the selectee, a non-veteran. We hold that these allegations were sufficient to establish jurisdiction under the Board's liberal pleading standard for USERRA claims that we endorsed in *Yates. See Perkins,* 85 M.S.P.R. at 547; *Jasper,* 73 M.S.P.R. at 368-71; *Duncan,* 73 M.S.P.R. at 92. Accordingly, we reverse the Board's decision to dismiss Mr. Patterson's USERRA claim and remand the case for further proceedings on the merits of that claim.

CONCLUSION

OPM's regulation at 5 C.F.R. § 302.101(c)(9) is valid. In addition, the agency did not violate Mr. Patterson's veterans' preference rights by applying the positive factor test when it considered his application for the attorney-advisor position. Accordingly, we affirm the Board's dismissal of Mr. Patterson's VEOA claim, although we do so on the ground that Mr. Patterson failed to assert a claim upon which relief could be granted, rather than upon the ground that the Board lacked jurisdiction. However, the Board did err in dismissing Mr. Patterson's USERRA claim. Under the liberal pleading standard applied to such

claims, Mr. Patterson asserted a non-frivolous allegation of discrimination on the basis of his prior service in the military. We therefore reverse the Board's dismissal of Mr. Patterson's USERRA claim and remand the case to the Board for further proceedings on the merits of that claim.

COSTS

Each party shall bear its own costs.

AFFIRMED-IN-PART, REVERSED-IN-PART, and *REMANDED.*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GUY C. PATTERSON,
Appellant,
v.
DEPARTMENT OF THE INTERIOR,
Agency.

DOCKET NUMBER
PH-3443-03-0078-I-1
DATE: -SEP 22 2004

Guy C. Patterson, Pittsburgh, Pennsylvania, pro se.

Kelly B. Bakayza, Pittsburgh, Pennsylvania, for the agency.

BEFORE

Neil A. G. McPhie, Acting Chairman
Susanne T. Marshall, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one, only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R.

§ 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

FOR THE BOARD:

/s/ [Illegible]
for Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NORTHEASTERN REGIONAL OFFICE

GUY C. PATTERSON,

Appellant,

v.

DEPARTMENT
OF THE INTERIOR,

Agency.

DOCKET NUMBER
PH-3443-03-0078-I-1

DATE: MAR 11 2003

Guy C. Patterson, Pittsburgh, Pennsylvania, pro se.

Kelly B. Bakayza, Pittsburgh, Pennsylvania, for the agency.

BEFORE
Frederick L. Fishman
Administrative Judge

INITIAL DECISION

On November 26, 2002, Guy C. Patterson appealed from the decision of the Department of Interior, Pittsburgh, Pennsylvania, not to select him for the position of Attorney-Advisor, GS-0905-11/13. The appellant requested a hearing with respect to this matter; however, because I found that the appellant had failed to allege a nonfrivolous basis for the Merit Systems Protection Board (Board) having jurisdiction over this matter, no hearing was scheduled. *See Burgess v. Merit Systems Protection Board,* 758 F.2d 641, 643 (Fed. Cir. 1985).

For the reasons stated below, the appeal is DISMISSED.

JURISDICTION

The agency moved that the instant appeal be dismissed as not being within the jurisdiction of the Board. The agency contends that the action which the appellant seeks to appeal, the agency's failure to hire him for a position, is not made appealable to the Board by any law, rule, or regulation.

The appellant has not demonstrated, by a preponderance of the evidence that he is entitled to appeal his non-selection for a position to the Board.

It is well established that the Board's authority to accept appeal is not plenary, but is limited to those matters over which it has been given jurisdiction by some statute or regulation. *See Jones v. Department of the Army,* 43 M.S.P.R. 508, 510 (1990). That is, the Board does not have authority to accept jurisdiction where none exists. *Rivard v. Department of Interior,* 29 M.S.P.R. 354, 355 (1985). The Board has no right to adjudicate all actions which are alleged to be incorrect. *See Marren v. Department of Justice,* 49 M.S.P.R. 45, 51 (1991).

The appellant has the burden of proof on the question of Board jurisdiction, and he must carry that burden by the preponderance of the evidence. *See* 5 C.F.R. § 1201.56(a)(2)(i) (2002); *Stern v. Department of the Army,* 699 F.2d 1312, 1314 (Fed. Cir. 1983), *cert. denied,* 462 U.S. 1122 (1983). Preponderance of the evidence means that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2) (2002).

The types of actions appealable to the Board generally, and with regard to the question of the individual's standing to appeal, are set forth at 5 C.F.R. § 1201.3 (2002). Both the courts and the Board have consistently held that a non-selection for a position, a non-promotion, or irregularities in promotion procedures are not directly appealable to the Board. *See, e.g., Latimer v. Department of the Air Force,* 657 F.2d 235, 237 (8th Cir. 1981); *Robins v. Department of Justice,* 48 M.S.P.R. 644, 650-51 (1991); *Stiles v. Department of the Navy,* 36 M.S.P.R. 646, 648 (1988). Accordingly, I find that if the appellant's appeal is viewed solely as an attempt to challenge his non-selection for a position, it must be dismissed as not being within the Board's jurisdiction.

The appellant's allegation of discrimination based upon prior military service.

The appellant alleges that the agency's decision not to hire him for a position as based on discrimination in federal employment on account of his prior military service. If the appellant has any rights to appeal to the Board from a non-selection action by an agency which allegedly discriminated against him on account of his prior military service, it is pursuant to 38 U.S.C. §§ 4311 and 4324 which were added to the United States Code by virtue of the Uniformed Services Employment and Reemployment Rights Act of 1994, Public Law 103-353, § 2(a), Oct. 13, 1994, 108 Stat. 3149 (USERRA).

Specifically, 38 U.S.C. § 4311(a) provides:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service

> in a uniformed service shall not be 'denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

The term "benefit", in the context of appeals pursuant to USERRA, is defined in 38 U.S.C. § 4303(2):

> The term "benefit", "benefit of employment", or "rights and benefits" means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

Under USERRA, the Board has appellate jurisdiction over appeals of any person alleging discrimination in federal employment on account of prior military service. *See* 38 U.S.C. §§ 4311(a), 4303(4)(A)(ii), 4324(b); *Yates v. Merit Systems Protection Board,* 145 F.3d 1480, 1483-84 (Fed. Cir. 1998); *Petersen v. Department of the Interior,* 71 M.S.P.R. 227, 231-40 (1996).

The appellant claimed that the agency's decision not to hire him for a position violated his veterans preference rights. The appellant contended that his not being hired for a position was based on his status as a veteran on account of his prior military service.

The courts and the Board have held that where an appellant makes a nonfrivolous allegation that the Board has jurisdiction over his appeal, the appellant is entitled to a hearing on the jurisdictional issue. *Dumas v. Merit Systems Protection Board,* 789 F.2d 892, 894 (Fed. Cir. 1986); *Schmidt v. United States Postal Service,* 39 M.S.P.R. 188, 192 (1988). A nonfrivolous allegation of Board jurisdiction is an allegation of fact, which if proven, could establish a prima facie case that the Board has jurisdiction over the case. *Dumas,* 789 F.2d at 894. In USERRA cases, the Board has liberally construed a determination, whether a discrimination claim in employment on account of a veteran's prior military service, is nonfrivolous. *See Crawford v. United States Postal Service,* 70 M.S.P.R. 416, 420-24 (1996). However, even under this liberal interpetation [sic], a nonfrivolous allegation must set forth specific factual assertions pertaining to a jurisdictional claim.

In the instant case, the appellant did not support his USERRA discrimination claim with any factual assertions indicating it was more than merely a pro forma statement. The appellant contends that he is the best qualified to fill the position. However, the appellant did not set forth any specific facts which show that the agency treated him more harshly or disparately in non [sic] selecting him for a position when compared to a similar [sic] situated individual who did not have prior military service. *See Coleman v. Department of the Air Force,* 66 M.S.P.R. 498, 508 (1995), *aff'd* 79 F.3d 1165 (Fed. Cir. 1996) (TABLE). The appellant has not otherwise set forth specific facts which would show that his prior military service was a substantial or motivating factor in the agency's determination not to select him for a position. *See Peterson* 71 M.S.P.R. at 240. The appellant just made vague and generalized statements

concerning his claim of discrimination based on his prior military service. Accordingly, since the appellant has not established a nonfrivolous allegation of discrimination under USERRA, the case must be dismissed.

The appellant's allegation of a violation of statute or regulation relating to veterans preperance [sic].

The appellant alleges the Board has jurisdiction over his appeal under the Veterans Employment Opportunity Act of 1998 (VEOA). 5 U.S.C. § 3330a. Under VEOA, the Board has appellate jurisdiction over the appeal of a preference-eligible veteran alleging a violation of any statutory regulation relating to veterans' preference. The matter complained of must have occurred on or after October 31, 1998. Additionally, before the Board can take jurisdiction over the appeal, the appellant must file a complaint with the Secretary of Labor within 60 days after the date of the agency's violation. The appellant may then file an appeal with the Board no sooner than 61 days after he filed his complaint with the Secretary of Labor and no later than 15 days after the date on which the appellant receives written notification from the Department of Labor that it is unable to resolve his complaint.

The appellant is advancing the action as an appeal under the Veterans Employment Opportunities Act. (VEOA). The record shows that the appellant first filed a complaint with the Department of Labor concerning this matter, and after being advised that the Department of Labor could not resolve this matter, the appellant filed an appeal with the Board. *See* Appeal File, Tab 1. Therefore, I find that the appellant complied with the statutory requirements for filing a VEOA appeal with the Board. *See Sears v. Department of the Navy*, 86 M.S.P.R. 76, 79 (2000).

I further note that the appellant has complied with the exhaustion of remedies requirement under 5 C.F.R. § 1208.21 (2002), and the appeal is timely under 5 C.F.R. § 1208.22 (2002).

To state his VEOA claim the appellant must allege that his statutory veterans preference rights were violated when the agency did not select him for the position of attorney-advisor. *See Sherwood v. Department of Veterans Affairs,* 88 M.S.P.R. 208, 210, 211 (2001). As discussed above, the courts and the Board have held that where an appellant makes a nonfrivolous allegation that the Board has jurisdiction over his appeal, the appellant is entitled to a hearing on the jurisdictional issue. *Dumas v. Merit Systems Protection Board,* 789 F.2d 892, 894 (Fed. Cir. 1986); *Schmidt v. United States Postal Service,* 39 M.S.P.R. 188, 192 (1988).

The appellant was advised that there was a question concerning the Board jurisdiction over the instant appeal in a show cause order. The appellant and the agency responded to the order. The agency's response included a motion to dismiss based on lack of jurisdiction.

The appellant claims that his statutory veterans preference rights were violated when the agency did not select him for the position of attorney-advisor. The appellant argues that, as a veteran, he was entitled to preference ranking and rating procedures on the examination, additional points be added to his score on the examination, "pass over" procedures be followed and other procedures applicable to veterans preference be followed.

The agency maintains that attorney positions have been excepted from the procedures applicable to veterans' preference. I find that the law and regulations do support

the agency's position. The exception of attorney positions from the veterans preference procedures, which are applicable to competitive positions, is set forth in the law and regulation. *See* 5 U.S.C. §§ 2108, 3309-3320, veterans preference act, application to attorney positions; 5 C.F.R. § 302.101(c)(9) (2002). I further find that this policy is emphasized in the agency's departmental manual. Chapter 302 § 1.4 states the following:

OPM has authorized the Department to exempt from appointment procedures the selections made for positions under the following Schedule A authorities:

5 C.F.R. § 213.3102(d)

Attorneys.

5 C.F.R. § 302.101 (2002) expounds upon 5 C.F.R. § 213.3102(d) by specifically exempting attorney positions from the competitive service point procedures and the assignment of points for veterans' preference. The agency points out that although it [sic] not rate and rank attorney positions, it complies with the law by considering a preference eligible's service as a positive factor in his application.

Based upon the above, I find that the appellant has failed to support his VEOA discrimination claim with any factual assertions which show that the agency violated any statute or regulation relating to veterans' preference. Thus, I find that the appellant has not established a nonfrivolous allegation that the agency denied him any rights under VEOA. Accordingly, I conclude that the board lacks jurisdiction of this appeal under VEOA.

DECISION

The appeal is DISMISSED.

FOR THE BOARD:

/s/ Frederick L. Fishman
Frederick L. Fishman
Administrative Judge

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

05-3047

GUY C. PATTERSON,

Petitioner,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

ORDER

(Filed Nov. 29, 2005)

A combined petition for panel rehearing and for rehearing en banc having been filed by the PETITIONER, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on December 6, 2005.

FOR THE COURT,

/s/ Jan Horbaly
Jan Horbaly
Clerk

5 U.S.C. § 1302. Regulations

* * *

(c) The Office shall prescribe regulations for the administration of the provisions of this title that implement the Congressional policy that preference shall be given to preference eligibles in certification for appointment, and in appointment, reinstatement, reemployment, and retention, in the excepted service in Executive agencies, permanent or temporary, and in the government of the District of Columbia.

* * *

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5 U.S.C. 2108. Veteran; disabled veteran; preference eligible

For the purpose of this title –

(1) "veteran" means an individual who –

(A) served on active duty in the armed forces during a war, in a campaign or expedition for which a campaign badge has been authorized, or during the period beginning April 28, 1952, and ending July 1, 1955;

(B) served on active duty as defined by section 101(21) of title 38 at any time in the armed forces for a period of more than 180 consecutive days any part of which occurred after January 31, 1955, and before the October 15, 1976, not including service under section 12103(d) of title 10 pursuant to an enlistment in the Army National Guard or the Air National Guard or as a Reserve for service in the Army Reserve, Naval Reserve, Air Force Reserve, Marine Corps Reserve, or Coast Guard Reserve; or

(C) served on active duty as defined by section 101(21) of title 38 in the armed forces during the period beginning on August 2, 1990, and ending on January 2, 1992; and who has been separated from the armed forces under honorable conditions;

(2) "disabled veteran" means an individual who has served on active duty in the armed forces, has been separated therefrom under honorable conditions, and had established the present existence of a service-connected disability or is receiving compensation, disability retirement benefits, or pension because of a public statute administered by the Department of Veterans Affairs or a military department;

(3) "preference eligible" means, except as provided in paragraph (4) of this section –

(A) a veteran as defined by paragraph (1)(A) of this section;

(B) a veteran as defined by paragraph (1)(B) or (C) of this section;

(C) a disabled veteran;

(D) the unmarried widow or widower of a veteran as defined by paragraph (1)(A) of this section;

(E) the wife or husband of a service-connected disabled veteran if the veteran has been unable to qualify for any appointment in the civil service or in the government of the District of Columbia;

(F) the mother of an individual who lost his life under honorable conditions while serving in the armed forces

during a period named by paragraph (1)(A) of this section, if –

(i) her husband is totally and permanently disabled;

(ii) she is widowed, divorced, or separated from the father and has not remarried; or

(iii) she has remarried but is widowed, divorced, or legally separated from her husband when preference is claimed; and

(G) the mother of a service-connected permanently and totally disabled veteran, if –

(i) her husband is totally and permanently disabled;

(ii) she is widowed, divorced, or separated from the father and has not remarried; or

(iii) she has remarried but is widowed, divorced, or legally separated from her husband when preference is claimed;

but does not include applicants for, or members of, the Senior Executive Service, the Defense Intelligence Senior Executive Service, the Senior Cryptologic Executive Service, or the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service;

(4) except for the purposes of chapters 43 and 75 of this title [5 USCS §§ 4301 et seq. and 7501 et seq.], "preference eligible" does not include a retired member of the armed forces unless –

(A) the individual is a disabled veteran; or

(B) the individual retired below the rank of major or its equivalent; and,

(5) "retired member of the armed forces" means a member or former member of the armed forces who is entitled, under statute, to retired, retirement, or retainer pay on account of service as a member.

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5 U.S.C. § 3308. Competitive service; examinations; educational requirements prohibited; exceptions

The Office of Personnel Management or other examining agency may not prescribe a minimum educational requirement for an examination for the competitive service except when the Office decides that the duties of a scientific, technical, or professional position cannot be performed by an individual who does not have a prescribed minimum education. The Office shall make the reasons for its decision under this section a part of its public records.

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5 U.S.C. § 3309. Preference eligibles; examinations; additional points for

A preference eligible who receives a passing grade in an examination for entrance into the competitive service is entitled to additional points above his earned rating, as follows – (1) a preference eligible under section 2108(3)(C)-(G) of this title – 10 points; and (2) a preference eligible under section 2108(3)(A)-(B) of this title – 5 points.

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5 U.S.C. § 3310. Preference eligibles; examinations; guards, elevator operators, messengers, and custodians

In examinations for positions of guards, elevator operators, messengers, and custodians in the competitive

service, competition is restricted to preference eligibles as long as preference eligibles are available.

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5 U.S.C. § 3311. Preference eligibles; examinations; crediting experience

In examinations for the competitive service in which experience is an element of qualification, a preference eligible is entitled to credit –

(1) for service in the armed forces when his employment in a similar vocation to that for which examined was interrupted by the service; and

(2) for all experience material to the position for which examined, including experience gained in religious, civic, welfare, service, and organizational activities, regardless of whether he received pay therefor.

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5 U.S.C. § 3312. Preference eligibles; physical qualifications; waiver

(a) In determining qualifications of a preference eligible for examination for, appointment in, or reinstatement in the competitive service, the Office of Personnel Management or other examining agency shall waive –

(1) requirements as to age, height, and weight, unless the requirement is essential to the performance of the duties of the position; and

(2) physical requirements if, in the opinion of the Office or other examining agency, after considering the recommendation of an accredited physician, the preference

eligible is physically able to perform efficiently the duties of the position.

(b) If an examining agency determines that, on the basis of evidence before it, a preference eligible under section 2108(3)(C) of this title who has a compensable service-connected disability of 30 percent or more is not able to fulfill the physical requirements of the position, the examining agency shall notify the Office of the determination and, at the same time, the examining agency shall notify the preference eligible of the reasons for the determination and of the right to respond, within 15 days of the date of the notification, to the Office. The Office shall require a demonstration by the appointing authority that the notification was timely sent to the preference eligible's last known address and shall, before the selection of any other person for the position, make a final determination on the physical ability of the preference eligible to perform the duties of the position, taking into account any additional information provided in any such response. When the Office has completed its review of the proposed disqualification on the basis of physical disability, it shall send its findings to the appointing authority and the preference eligible. The appointing authority shall comply with the findings of the Office. The functions of the Office under this subsection may not be delegated.

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5 U.S.C. § 3313. Competitive service; registers of eligibles

The names of applicants who have qualified in examinations for the competitive service shall be entered on appropriate registers or lists of eligibles in the following order –

(1) for scientific and professional positions in GS-9 or higher, in the order of their ratings, including points added under section 3309 of this title; and

(2) for all other positions –

(A) disabled veterans who have a compensable service-connected disability of 10 percent or more, in order of their ratings, including points added under section 3309 of this title; and

(B) remaining applicants, in the order of their ratings, including points added under section 3309 of this title.

The names of preference eligibles shall be entered ahead of others having the same rating.

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5 U.S.C. § 3314. Registers; preference eligibles who resigned

A preference eligible who resigns, on request to the Office of Personnel Management, is entitled to have his name placed again on all registers for which he may have been qualified, in the order named by section 3313 of this title.

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5 U.S.C. § 3315. Registers; preference eligibles furloughed or separated

(a) A preference eligible who has been separated or furloughed without delinquency or misconduct, on request, is entitled to have his name placed on appropriate registers and employment lists for every position for which his qualifications have been established, in the order named by section 3313 of this title. This subsection applies to registers and employment lists maintained by the Office of

Personnel Management, an Executive agency, or the government of the District of Columbia.

(b) The Office may declare a preference eligible who has been separated or furloughed without pay under section 7512 of this title to be entitled to the benefits of subsection (a) of this section.

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5 U.S.C. § 3316. Preference eligibles; reinstatement

On request of an appointing authority, a preference eligible who has resigned or who has been dismissed or furloughed may be certified for, and appointed to, a position for which he is eligible in the competitive service, an Executive agency, or the government of the District of Columbia.

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5 U.S.C. § 3317. Competitive service; certification from registers

(a) The Office of Personnel Management shall certify enough names from the top of the appropriate register to permit a nominating or appointing authority who has requested a certificate of eligibles to consider at least three names for appointment to each vacancy in the competitive service.

(b) When an appointing authority, for reasons considered sufficient by the Office, has three times considered and passed over a preference eligible who was certified from a register, certification of the preference eligible for appointment may be discontinued. However, the preference eligible is entitled to advance notice of discontinuance of certification.

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5 U.S.C. § 3318. Competitive service; selection from certificates

(a) The nominating or appointing authority shall select for appointment to each vacancy from the highest three eligibles available for appointment on the certificate furnished under section 3317(a) of this title, unless objection to one or more of the individuals certified is made to, and sustained by, the Office of Personnel Management for proper and adequate reason under regulations prescribed by the Office.

(b)(1) If an appointing authority proposes to pass over a preference eligible on a certificate in order to select an individual who is not a preference eligible, such authority shall file written reasons with the Office for passing over the preference eligible. The Office shall make the reasons presented by the appointing authority part of the record of the preference eligible and may require the submission of more detailed information from the appointing authority in support of the passing over of the preference eligible. The Office shall determine the sufficiency or insufficiency of the reasons submitted by the appointing authority, taking into account any response received from the preference eligible under paragraph (2) of this subsection. When the Office has completed its review of the proposed passover, it shall send its findings to the appointing authority and to the preference eligible. The appointing authority shall comply with the findings of the Office.

(2) In the case of a preference eligible described in section 2108(3)(C) of this title who has a compensable service-connected disability of 30 percent or more, the appointing authority shall at the same time it notifies the Office under paragraph (1) of this subsection, notify the preference eligible of the proposed passover, of the reasons

therefor, and of his right to respond to such reasons to the Office within 15 days of the date of such notification. The Office shall, before completing its review under paragraph (1) of this subsection, require a demonstration by the appointing authority that the passover notification was timely sent to the preference eligible's last known address.

(3) A preference eligible not described in paragraph (2) of this subsection, or his representative, shall be entitled, on request, to a copy of –

(A) the reasons submitted by the appointing authority in support of the proposed passover, and

(B) the findings of the Office.

(4) In the case of a preference eligible described in paragraph (2) of this subsection, the functions of the Office under this subsection may not be delegated.

(c) When three or more names of preference eligibles are on a reemployment list appropriate for the position to be filled, nominating or appointing authority may appoint from a register of eligibles established after examination only an individual who qualifies as a preference eligible under section 2108(3)(C)-(G) of this title.

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5 U.S.C. § 3320. Excepted service; government of the District of Columbia; selection

The nominating or appointing authority shall select for appointment to each vacancy in the excepted service in the executive branch and in the government of the District of Columbia from the qualified applicants in the same manner and under the same conditions required for the competitive service by sections 3308-3318 of this title. This

section does not apply to an appointment required by Congress to be confirmed by, or made with the advice and consent of, the Senate.

Veterans' Preference Act of 1944, § 18, 58 Stat. 387, 391.

Sec. 18. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the government or officer thereof.

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5 C.F.R. § 302.101 Positions covered by regulations.

(a) Positions covered. With respect to the application of veteran preference, this part applies to each position in the Executive Branch of the Federal Government that is not in the competitive service and that is subject to the provisions of title 5, United States Code, or subject to a statutory requirement to follow the veteran preference provisions of title 5. With respect to restoration rights that are due to compensable injury and appeals therefrom, this part applies to those positions covered by 5 U.S.C. 8101(1) that are not in the competitive service.

* * *

(c) Positions exempt from appointment procedures. In view of the circumstances and conditions surrounding employment in the following classes of positions, an agency is not required to apply the appointment procedures of this part to them, but each agency shall follow the

principle of veteran preference as far as administratively feasible and, on the request of a qualified and available preference eligible, shall furnish him/her with the reasons for his/her nonselection. Also, the exemption from the appointment procedures of this part does not relieve agencies of their obligation to accord persons entitled to priority consideration (see § 302.103) their rights under 5 U.S.C. 8151:

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(9) Attorney positions;

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